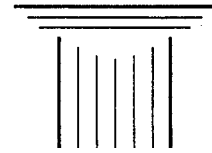


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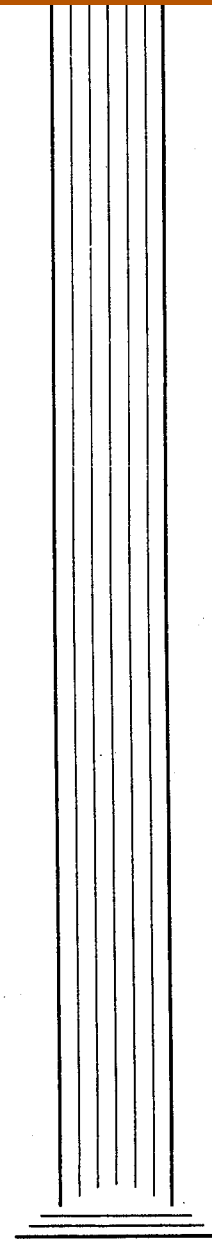


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Consent Decrees: Practical Problems and Legal Dilemmas

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Justice Chicago Style

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In the late 1970s and early 1980s a new movement took root in the bar. It was called Alternative Dispute Resolution ("ADR") and was for the most part an attack upon the strong exercises of judicial power that marked the previous decade. The proponents of ADR sought to substitute a number of alternative processes for adjudication. Most of these processes have been around for a long, long time. What the proponents of ADR did, however, was to place a new emphasis upon these alternative processes and organize them into a program. Some of these processes, like arbitration, involve a third-party decision maker and thus seem similar to adjudication, but are in truth private. Others, like mediation and settlement, are more explicitly private. They contemplate the resolution of disputes through bargaining and negotiation.

As a movement, ADR had its origin in a series of speeches by Chief Justice Burger in the mid 1970s. The movement was nourished by the same forces that gave rise to the politics of "deregulation" and "privatization" that dominated the late 1970s and early 1980s, and that reached something of a zenith during the early years of the Reagan presidency. In the summer of 1983, however, the political base of ADR was significantly broadened by two events—the search for alternatives was endorsed by the President of Harvard, Derek Bok, a liberal spokesman of some prominence, and the American Association of Law Schools decided to form a new section exclusively devoted to ADR. At the annual convention of the Association, held in San Francisco in January 1984, a joint meeting of the Civil Procedure and ADR sections was held to celebrate the founding of the ADR section. The speech that later became *Against Settlement*¹ was my own peculiar celebratory offering.

† Alexander M. Bickel Professor of Public Law, Yale University. George Priest and Madeline Morris helped me with this essay. I also benefited from the work of Jules Coleman and Charles Silver, *Justice in Settlements*, 4 Soc. Phil. & Pol'y 103 (1986), and the discussion of their paper at a faculty workshop at Yale.

¹ Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

In that talk, I focused on the relationship between the Federal Rules of Civil Procedure and ADR. By way of introduction, I pointed to the 1983 amendment to Rule 16, which enhanced the role of judges in brokering settlements. That amendment, I argued, created a danger, stressed by Professor Judith Resnik in her earlier work² and given dramatic statement in the Agent Orange case,³ of the judge becoming thoroughly enmeshed in the settlement negotiations. Such involvement would, in my judgment, constitute an abuse of the judicial office and dash all hopes of an impartial decision if the negotiations failed and the case had to go trial. But this is not a reason to be against settlement, but only to be opposed to a certain kind of settlement, one in which the bargaining relationship is transformed from a two to a three party format, and in which the judge becomes the third party. The focus of my concern was instead on the then-recent proposal to amend Rule 68, the offer-of-settlement rule. The proposed amendment sought to increase the pressure on the parties to settle, by altering the standard American rule on attorneys' fees. The amendment would have made parties liable for the attorneys' fees of their opponent if they refused an offer of settlement that was better than the judgment ultimately entered. In criticizing this proposal, I drew an analogy between the settlement of civil suits and its criminal counterpart, plea bargaining, and tried to show how settlement is subject to many of the criticisms commonly voiced against plea bargaining.

I acknowledged that settlement saves society the resources that would otherwise be consumed at trial, and that settlement has certain other benefits, primarily because it rests on the parties' consent. But I also insisted that there was another side to the balance sheet: Settlements are especially likely to reflect the inequalities of power and resources that the parties bring to the bargaining table; they may well affect parties who were not and could not have been part of the negotiation; they may leave the courts without an adequate foundation for subsequent interventions; and, finally, they provide no authoritative declaration of rights. Settlements often produce peace but leave justice undone. Although these arguments were primarily addressed to the proposed amendment to Rule 68, and the effort to increase the pressure on the parties to settle, they obviously had important implications for the ADR movement in general. This was recognized by the bar and the

² Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982). See generally Symposium on *Litigation Management*, 53 U. Chi. L. Rev. 306 (1986).

³ Peter H. Schuck, *Agent Orange On Trial: Mass Toxic Disasters in the Courts* (1986).

academy, and in a subsequent article, I generalized my arguments and took on ADR in its full scope.⁴

The topic of this symposium is not ADR, but rather consent decrees, and it is important to understand at the outset that this topic bears a complicated relationship to ADR. A consent decree rests on an agreement or contract between the parties and to that extent can be seen as simply another ADR method. It substitutes contract for trial and judgment, and thus is a private form of social ordering. A consent decree is, however, a very special form of settlement because it introduces an element that is judicial rather than contractual. A consent decree is an exercise of public power. A consent decree rests on a contract or exchange, true, but it is still a decree—an order of a court, backed by the threat of contempt. And it is this judicial element that differentiates the consent decree from the alternatives typically advanced by proponents of ADR—those alternatives are intended to avoid not only trial and judgment, but also the courts and the apparatus of the state in general.

This difference between the methods of resolving lawsuits generally favored by ADR and consent decrees has caused strange alignments. Some of those who favor ADR are critical of consent decrees. The most stunning example is Attorney General Meese.⁵ There are, however, others who approach ADR and consent decrees in a more unitary fashion. This seems to be true of Judge Easterbrook, who embraces both. He starts with a defense of settlement understood as a purely private or contractual institution, and then extends his argument to consent decrees, minimizing their judicial element. He notes in passing some differences between a consent decree and a contract, but leaves no doubt how he views a consent decree: "It is a contract all the same."⁶ I also take a unitary approach to ADR and consent decrees, but, unlike Judge Easterbrook, I am critical of both. I believe that a consent decree involves all the problems and dangers of a settlement understood as a purely contractual phenomenon. A consent decree rests on a contract or exchange, and, since a legal instrument can be no better than the ground upon which it rests, a consent decree will be subject to the same infirmities as settlement. I also believe, how-

⁴ Owen M. Fiss, *ADR: Second Class Justice?*, Conn. L. Tribune, p. 1 (March 17, 1986).

⁵ See Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. Chi. Legal F. 241, 242, 279-90.

⁶ Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. Legal F. 19, 20.

ever, that consent decrees are in one important respect worse than purely contractual settlements. This defect arises from the fact that they constitute an appropriation of a public power. Parties who enter a consent decree are trying to use the judicial power for their own purposes without recognizing the procedural limitations on the exercise of that power.

I

ADR is a wide and diverse movement. No single theory explains or justifies all the various strands. Many defend ADR on the basis of budgetary considerations, on the saving to society of the resources that would otherwise be consumed by trial. These proponents of ADR acknowledge that a settlement is more likely to fall short of justice than a fully adjudicated judgment, but nonetheless prefer settlement as a method of conflict resolution on the theory that justice, and the process most likely to lead to it, is simply something that we cannot afford. They accept the methods of ADR, including settlement, as second best. Perhaps this is a fair characterization of Chief Justice Burger's position, but such an attitude is not in any way confined to those whose political inclination is conservative. There are many people on the left who defend ADR on a second-best theory, not so much to conserve social resources (generally of little concern to the left), but rather to insulate public interest litigation from Reagan's new judges.

I am not (wholly) oblivious to these pragmatic considerations. The subject of my concern here, however, is not these second-best defenses of ADR (which, in any event, strike me as wholly exaggerated and not in the least capable of justifying the broad ADR program), but rather the defense of ADR that is couched in more idealistic terms. I am concerned with those who see settlement or some other form of bargained-for resolution of a lawsuit not as a second-best alternative, but as a more perfect instrument of justice than trial and judgment. And on this level, the issue that divides me from the proponents of settlement is not empirical, as it would be if we agreed on the definition of justice and then undertook a study of comparative institutional deficiencies, in order to determine which institution—adjudication or settlement—would be more likely to achieve our common aspiration. Rather, the difference is conceptual, a disagreement over what justice means.

Such conceptual disagreements can take many forms. Professors McThenia and Shaffer gave us one example. Moved by a religious vision, they based their preference for settlement, mediation, and other negotiated resolutions of lawsuits on a conversational

conception of justice. "Justice is," so they claimed, "what we discover—you and I, Socrates said—when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from."⁷ I dealt with that claim elsewhere.⁸ Here I take up the claim of Judge Easterbrook who, invoking a quite different God, and drawing on that rich body of law and economics literature developed in Chicago in the 1970s, also aspires to "perfect justice" (his term). The only catch is that he sees justice as efficiency.

Easterbrook does not emphasize the resource saving for society that might come from settlement, for he well understands that "cheap justice" is not the same as "perfect justice," and that "perfect justice" might be quite expensive. Rather, his strategy is to emphasize the advantages that come to the parties in a settlement. As he puts it, "Settlements are desirable not only because they 'save the time of the courts' (a social benefit) but also because all parties to the settlements prefer them to the results they anticipate obtaining from the court."⁹

Implicit in this assertion, and for that matter the entire theory of justice as efficiency, is a series of three questionable propositions. One assumes, from the very existence of a settlement, a preference of the parties for the terms of the settlement over what they anticipate they will receive from a court after trial and judgment. A second transforms that relative and conditioned preference (settlement over adjudication, given the costs of trial, the politics of the judges, etc.) into a statement of what "all affected people desire," and then further transforms what "all affected people desire" into that which is "desirable." And a third transforms that which is "desirable," as it is now understood, into that which is "just." Of the three, the last proposition is the most troubling, and perhaps the most relevant for our purposes, for it tends to belittle the ultimate and most distinctive aspirations of the law and of adjudication. But all three are central to the argument that seeks to establish the priority of settlement, and the underlying exchange, as the instrument of "perfect justice."

To grasp the full sweep of this argument, and the theory that sees justice as efficiency, we must, for the moment, step back from the courthouse and turn to the market. We should imagine two

⁷ Andrew W. McThenia and Thomas L. Shaffer, *For Reconciliation*, 94 Yale L.J. 1660, 1665 (1985).

⁸ Owen M. Fiss, *Out of Eden*, 94 Yale L.J. 1669 (1985).

⁹ Easterbrook, 1987 U. Chi. Legal F. at 25 (cited in note 6).

persons bargaining and assume that each person engaged in the transaction knows his or her desires or preferences best; that each is trying to maximize the satisfaction of his or her preferences; and that each is free to engage in the transaction. Under these conditions, an exchange will take place between the two if, and only if, it will improve both their positions. If it can now be further assumed that the transaction will not adversely affect the interests of anyone else, the transaction appears highly desirable. Indeed, it is hard to imagine who might complain, since everyone's position will have been improved. As Easterbrook, following Pareto, declares, "[w]e should applaud a procedure that makes everyone better off without making anyone else worse off."¹⁰

From this perspective, exchange appears as an almost perfect institution for maximizing the satisfaction of preferences under conditions of scarcity. And since it is commonly assumed that the maximum satisfaction of preferences is the goal of the economic system, we can readily understand the paramount place of exchange in that system. Easterbrook and others who see justice as efficiency do not want to stop there, however, but envision a similar role for bargaining and exchange within the legal system. They attribute to that system the same end we attribute to the economic system: maximizing the satisfaction of preferences. They assume that the end of the legal system is to maximize the satisfaction of preferences, and accordingly, conceive of bargaining, exchange and contract as the primary social mechanisms for achieving justice.

Adjudication is not, even under this theory, totally superfluous, but more in the nature of a supplementary institution. It exists in the shadow of bargaining (to reverse the Mnookin and Kornhauser metaphor).¹¹ Sometimes adjudication facilitates bargaining and exchange by, for example, demarcating property rights, enforcing contracts, or preventing fraud. There are times, however, when a bargained-for exchange is not possible, no matter what the court does (e.g., the number of people affected is too large), but even then, exchange retains its primacy, for it is assumed that the function of the court is to mimic the market: The just result is that to which the parties would agree were they able to engage in exchange. And if that is so, we can well understand the priority of settlement or some other bargained-for resolution of a lawsuit: It embodies what the court could only hope to achieve

¹⁰ Id.

¹¹ Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

after trial.

Confronted with any particular exchange, whether it involves the purchase of a consumer good or the settlement of a lawsuit, it is, of course, possible to object on the ground that the agreement does not satisfy one of the conditions previously specified for a "Pareto superior exchange" (that is, one that would, from the perspective of satisfying preferences, leave everyone better off). For example, someone might try to show that consent to the transaction is not freely given, that the parties do not in fact know what is in their best interest, or that the interests of third parties will be adversely affected. These kinds of objections are thoroughly canvassed in the literature and are well known to Easterbrook. He argues for settlement on the theory that exchange is the preferred instrument of justice, but never in a way that overlooks the fact that, on occasion, the conditions hypothesized for Pareto superior exchange might not be satisfied. As he makes evident in Part II of his paper, where he deals with government consent decrees and the problem of succession in office, he is even prepared to identify certain *categories* of consent decrees as suspect or problematic, because the conditions originally specified for a Pareto superior exchange are not likely to be satisfied.¹²

This strikes me as an important concession, and one may object to Easterbrook's position on the ground that the exception is far broader than he acknowledges. The danger that a settlement and the consent decree based on it might bind successors in office, even though they have not consented to the settlement or the decree, and are not fully or adequately represented in the bargaining process, is not in any way confined to government agencies. It is present whenever one of the parties to the agreement is a large scale organization. Indeed, going further, one could rightly claim, as Burt Neuborne did in response to Douglas Laycock's paper,¹³ that any rule barring settlements or consent decrees from compromising the interests of third parties would put an end to bargained-for resolutions of public litigation. Such cases always implicate the interests of third parties who do not participate in the bargaining and are not fully represented in that process. My real objection to Easterbrook's position, however, is of another character. It goes not to the scope of exceptions he allows to the rule favoring bargain and exchange, but rather to the rule itself and the

¹² Easterbrook, 1987 U. Chi. Legal F. at 31 (cited in note 6).

¹³ Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103.

theory of justice upon which it is founded. My objection goes not to the estimate of the number of exchanges that fail to meet the conditions presupposed by a Pareto superior exchange, but rather to the claim that justice is efficiency, or the series of propositions that move from what the parties prefer to what is desirable and then on to what is just. This is not to deny that some (or even many) exchanges improve the position of everyone in the sense Pareto envisioned, or to deny that bargaining and exchange are, as a general matter, apt instruments for maximizing the satisfaction of preferences; rather, it is to understand justice and the function of adjudication in different terms altogether.

Leave the marketplace. Return to the courthouse and imagine a typical school desegregation case (or any other case that is at the center of the current debate about consent decrees). The social function of that proceeding is not, I believe, to maximize the satisfaction of the preferences of the parties, or even of all the residents of the city, or to help the blacks and the school board bargain with one another. Nor should a court, even if it could, define its task in terms of some hypothesized market transaction. The just result is most emphatically not a guess as to what the parties, or the various groups they represent, would agree to were they able to engage in exchange. The court's duty is, instead, to do justice: to ascertain whether the commitment to racial equality embodied in the Fourteenth Amendment has been violated, and if so, to establish a regime of state power that will bring the school board into compliance with the law. Adjudication is a process by which the values embodied in the law are interpreted and actualized, not a method for maximizing the satisfaction of preferences, and justice is the ultimate aspiration of that process.

Justice might be efficiency if we somehow managed to translate the values of the law into the preferences of the parties (or the people they represent) and also assumed that all preferences have an equal claim to satisfaction (under what Judge Bork calls "the Equal Gratification Principle"¹⁴), but we have never been given a good reason—by Easterbrook or any other practitioner of the Chicago brand of law and economics—for such a reduction. Deciding what the constitutional commitment to racial equality requires, in terms of both rights and duties, is a difficult and arduous task, but

¹⁴ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1 (1971). The reduction of values into preferences, and the assumption that all preferences are of equal worth, are necessary to make the end of adjudication purely quantitative—maximization, as understood by the economists.

no one will be helped in that endeavor by thinking of the parties to a desegregation suit as though they were participants in a market exchange, haggling over the price of a bicycle, trying to maximize the satisfaction of their preferences under conditions of scarcity. What they are fighting over is the meaning of the law and how it is to be implemented—and that is what the court must decide.¹⁵

Admittedly, our courts are not self starting. They await controversies to arise and for people or agencies, public or private, to bring before them claims that the law has been violated. It is also true that if, for some reason (e.g., disinterest or a deal), the parties do not wish to proceed further, the court is not likely to continue the suit by itself or order the parties to go on. An agreement between the contending parties is an event that stops the exercise of the judicial power. This dependence of the judiciary upon the initiative of others is not hard to understand—it can be traced to the historical fact that courts lack the resources required for initiation, or perhaps to the fear that for a court to become an initiating agency might compromise its impartiality.¹⁶ One can acknowledge the judiciary's dependence on others without suggesting that this dependency transforms the social function of adjudication from interpreting and actualizing public values into one of maximizing the satisfaction of the preferences of the parties. The capacity of an institution to discharge its social function may be limited by certain conditions without that function or aspiration becoming reduced to those conditions.

Of course, the parties might come to an agreement that gives full and adequate expression to the values embodied in the law. The plaintiff might demand too much, and come to his or her senses in the midst of the case, or the defendant might agree to comply after the lawsuit is filed. Anything is possible. But once we eschew the theory that sees justice as efficiency, we have no a priori or theoretical reason for believing that the parties are more likely than a court to do justice, that through bargaining they are more likely than a court, after trial and judgment, to hit on the right interpretation of equal protection. Predictions about the law enter into the bargain, but what the parties seek to further in their negotiations is their own interests, not the law, and thus these predictions about the law appear in the final agreement in a complicated and attenuated form.

¹⁵ See generally Owen M. Fiss, *The Death of the Law?*, 72 Cornell L. Rev. 1 (1986).

¹⁶ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 385-87 (1978).

This might seem to leave adjudication and bargaining at a standstill, each making a claim to justice, understood now as the ultimate aspiration of law, with no *a priori* or theoretical reason for preferring one over the other. There are agreements or bargains that fall short of justice, but the same could be said of adjudication. My inclination is, however, not to stop here, but rather to reverse Easterbrook's priorities and to claim a priority for judgment over contract. I acknowledge that adjudication consumes social resources and that settlement might save those resources and provide some private advantage to the parties—why else would they agree? But I believe that adjudication and judgment are, as a general matter, more likely to produce justice than bargaining, and that is why we tend to measure the adequacy of a settlement—not as a device to produce peace, but as an instrument of justice—by comparing it to the judgment that might have been entered after a full trial (not, as Easterbrook supposes, the other way around).

To some extent this position reflects doubts voiced earlier about the prevalence of the conditions that are presupposed by Pareto, Easterbrook, and others who are inclined to favor bargaining or private ordering in general. Bargaining presupposes an individualistic party structure that is at odds with the realities of much contemporary litigation, especially the cases that are at the center of controversies over consent decrees. The paradigmatic party in such litigation is not the autonomous individual, but the social group or bureaucratic entity, with no clearly demarcated authoritative spokespersons. Third-party interests are always compromised. Those who celebrate bargaining and exchange also presuppose a rough parity among the participants to the transaction that I find at odds with modern realities as well. Settlement is said to favor the "poorer" party, for the costs of litigation are saved, but those savings are likely to be reflected in the terms of the settlement—what the "richer" party will offer in order to bring the litigation to an end.

These doubts about the efficacy of exchange obviously reflect sociological hunches about settlement and consent decree practice. There is, however, another, less empirical factor that leads me to favor adjudication over bargaining, as the institution most likely to produce justice. It stems from the very nature of the two institutions and the fact that one is private, the other public: Whereas bargaining is directed toward maximizing the satisfaction of the preferences of the parties, the goal of adjudication is, after all, justice.

At least in the category of cases we are considering, all from

the equity side of the court, adjudication can be understood as a social institution that allocates the power of decision to public officials (judges), and that conditions the exercise of that power on an investigation that occurs in public (the trial) and on a statement of reasons (the opinion) that is accessible to the public and that seeks to persuade the public of the correctness of the judgment. None of this can assure that the result in any particular case will be the just result, but it defines the aspiration of the institution in appropriate terms and establishes mechanisms of accountability—public criticism, legislative revision, and in some cases, removal from office. The judiciary is held accountable for the justice of its results in a way that is not true of the parties in bargaining. It is not only that bargaining typically goes on behind closed doors, and thus is inaccessible to public scrutiny, but also that the bargaining is dominated by, and is conducted for the purpose of furthering, the interests of the parties who are in control of that process.

Sometimes those interests might be broadly conceived, as for example, when a party is represented by a “public interest” law firm, or when the party is a governmental entity. Yet even in such cases, the conception of interests is not coextensive with the interest in justice that guides the judiciary and to which the judiciary is held accountable; the ACLU or the Department of Justice is entitled to allow resource constraints or politics understood quite broadly to determine what they will accept (or refuse to accept) in negotiating a settlement. In the great majority of cases, moreover, involving private parties and corporations, the ruthless pursuit of self interest, narrowly conceived, is the accepted norm in bargaining relationships and constitutes the standard by which the exchange is measured: A settlement works when the parties are happy or their desires are satisfied.

I acknowledge that such private bargaining might on occasion, through the wonders of the invisible hand or some other mysterious mechanism, lead to the just outcome—justice and happiness are not mutually exclusive. But assuming that we have truly eschewed the view that treats justice as efficiency, and that confuses justice with happiness or even peace, it seems to me that justice is less likely to be achieved through bargaining than through the normal working of a public institution—adjudication—which self-consciously and purposively aspires to that end, knowing full well that it will be held accountable if it fails. To favor adjudication over bargaining is to express a faith in collective reason, that is, in our capacity, as a people, to formulate social goals and to build institutions that self consciously try to achieve those goals.

II

A consent decree is premised upon a bargain between the parties, but is not, as I already said, reducible to that bargain. A consent decree differs from the bargain in as much as it represents an exercise of public power. It is an order by a court, directing certain parties to do or refrain from doing certain things, backed by an implicit threat of state sanctions for noncompliance.

Of course, if the bargain upon which the consent decree rests is defective in some important respects then the consent decree will also be defective. Water can rise no higher than its source. If the exchange does not improve the position of all (because, for example, it makes third parties worse off and does so to a degree greater than it improves the position of those who signed the pact), then the decree will suffer this same defect. In the eyes of Pareto, such a consent decree will be as inadequate as the exchange upon which it rests. The same is true from the standpoint of Justitia: If the bargaining results in a deal that falls short of justice, understood in a more expansive sense than Pareto might allow, so will the consent decree. It seems to me, however, that there is another and perhaps more fundamental point that should be made: There is reason to object to a consent decree even if we can assume, solely for purposes of argument, that it rests upon an exchange that improves the position of everyone, or is in some more robust sense substantially just, for a consent decree, almost by definition, constitutes a use of the judicial power that does not respect the procedural limitations on the exercise of that power.

Professor Resnik asked in the course of our discussion, "What does a judge do before entering a consent decree?" and answered, quite succinctly, "Nothing." This might have been a bit of an exaggeration, but not much. As she points out,¹⁷ many consent decrees are entered, that is, signed by the judge and filed with the clerk of the court, at the very same moment that the complaint is filed. The lawsuit is ended as soon as it is begun. Other consent decrees are entered as the litigation unfolds, but even these are entered before that process has come to conclusion, that is, before the trial is over, or before the court finds the facts or applies the law. There is still a final category of consent decrees that are entered after the judge has concluded that the defendant has violated the law, but before the court fixes the remedy. In that instance, the process that is pretermitted is the one in which the remedy is fashioned. A

¹⁷ Judith Resnik, *Judging Consent*, 1987 U. Chi. Legal F. 43, 47.

consent decree is, by definition, based on an agreement between the parties, not on the judgment of a court, and thus the stage of the litigation at which the decree is entered makes no difference. Consent decrees are not preceded by the full and meticulous examination of the facts and the law that normally precedes and constitutes judgment. That is, indeed, the whole point of a consent decree.

A judge, of course, has a choice at the outset whether to sign the decree proposed by the parties, and in fact is supposed to ask whether the proposed decree "furthers the objectives of the law" or is "fair, adequate and reasonable."¹⁸ This standard, similar to the "probable cause" standard used in the criminal law to test the adequacy of a plea, is a lesser standard than would be applied by the judge after full trial. Of even greater significance is the fact that the court is asked to apply that standard in something of a procedural vacuum. No doubt, the judge will be confronted with various representations and assurances by the parties as to facts and to the state of the law. But those representations—made soon after both sides have struck a deal and at a time when they are anxious to make sure it does not come undone—are no substitute for the meticulous processes of the law, trial in an adversarial context and a judgment based on the record and justified publicly. This is particularly true because the judge will often have his or her own personal reasons to avoid the tensions of a long trial or the agony of judgment, and thus be tempted to accept these representations at face value.

A consent decree is not written in stone. If a court later learns, after a full hearing, that the initial consent decree is not in accordance with the law, or is otherwise unjust, the court might modify the decree or decline to enforce it (in general or against particular persons). This so-called "second hearing" does not, however, adequately compensate for the absence of a "first hearing," that is, one that might be conducted prior to entry of the decree. For one thing, since judicial credibility is not enhanced when a court declines to enforce its decrees or declares that the initial decree is not fair or not effective, and thus needs modification, a subtle bias will inevitably enter the so-called "second hearing" in favor of the initial decree. In the case of modification, the bias is not especially subtle: A court faced with a request by the defendant for modification is supposed to decide, in the terms of Cardozo, whether the

¹⁸ See generally *Local Number 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986).

danger that the decree seeks to curb has been "attenuated to a shadow."¹⁹ Second, the "second hearing" is likely to be encumbered and complicated by the absence of a hearing in the first instance. Because of the absence of the initial findings of fact or conclusions of law, there will be no clear basis for identifying what the aims or purposes of the original decree are, either for determining whether a violation has occurred or deciding whether conditions have sufficiently changed to warrant modification. The judge faced with a request for modification must reconstruct, in the "second hearing," the factual situation that preceded the entry of the consent decree in order to determine whether the danger to be curbed by the decree has in fact disappeared or whether the decree has become, due to a change of circumstances, oppressive. Finally, as Judge Easterbrook recognizes in his treatment of government consent decrees, as long as the consent decree is on the books, it looks like "the law" and purports to be "the law," and as such, is likely to influence behavior, by discouraging some from acting or by empowering others.

Foregoing the processes of the law may save society resources. Something is saved, but something is also lost. The procedural shortcut enhances the risk of error. Adjudication may be elaborate and expensive, but I do not view it as either dysfunctional or arcane. It reflects our best judgment, worked out over centuries, as to how to sort out the truth in the face of uncertainty. Changes may be necessary, in the way witnesses are examined, or as to the scope of discovery, or in some other particular, but I am not convinced that we can dispense with that process altogether—as consent decrees do—without greatly increasing the risk of error.

There is, however, a deeper point, and indeed must be, for my claim is that a consent decree is a highly problematic legal instrument even if one assumes, for purposes of argument, that the agreement between the parties fully and adequately represents what the law requires and is in that sense substantially just. To maintain this position, one need only recognize that processes of the law serve not only an instrumental function, but a legitimating one as well: The processes foregone are not simply valued because they reduce the risk of error, but also because they serve as an important source of legitimacy for the judicial power. The authority of judges to speak the law, to determine, for example, what the constitutional commitment to racial equality requires, arises not

¹⁹ *United States v. Swift & Co.*, 186 U.S. 106, 119 (1932).

from any supposed moral expertise the judges might possess as persons, but from the processes that limit the exercise of their power and thus define their office. Yet it is with these very processes that the consent decree practice dispenses.²⁰

I understand why the parties to a lawsuit might want to skip these processes and settle rather than litigate: Each believes that he or she will be better off settling. I also understand why the plaintiff might wish to embody that agreement in a consent decree: The decree commits the court, from the very outset, to enforcing the agreement through the exercise of the contempt power. A settlement agreement, like any contract, might be subject to specific performance at some later time, if one of the parties breaches or threatens a breach; but transforming the settlement agreement into a consent decree at the outset gives the plaintiff the benefit of the contempt power right away and avoids the bother and vicissitudes of the trial that otherwise must precede the issuance of an order granting specific performance. Each infraction of the agreement is not just a breach, but also a contempt. I also understand why the defendant might acquiesce in the plaintiff's effort to get the settlement agreement embodied in a consent decree: Such acquiescence might be a condition of the settlement (which in other respects is favorable to the defendant) or the defendant might perceive some strategic or political advantage in being subject to a consent decree (e.g., it is harder for a subsequent administration to repudiate). In other words, I fully understand why the parties might ask the court to transform their settlement agreement into a decree, but the choice is not theirs to make. Trial and judgment exist not just for the benefit of the parties, but are intended to serve public purposes, and thus cannot be waived or otherwise disposed of by the parties, and, if they have a basis in Article III or precepts of natural law (as to what it means to act as a court), may even be beyond the reach of the legislature.²¹ The judge must

²⁰ See generally Owen M. Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1 (1979). For these reasons, I take exception to the view of Justice Brennan, expressed in *Local Number 93*, 106 S. Ct. at 3077-78. He is prepared to allow, at least in the Title VII context, consent decrees more latitude than adjudicated decrees in terms of what the court might require of the defendant. In my view, dispensing with the ordinary processes of the law, namely, trial and judgment, should restrict rather than enhance the power of the court.

²¹ *Clever Brandeis*, anxious to facilitate the use of consent decrees, especially in the antitrust context, insulated them from the obvious Article III objection by holding that such an objection cannot be raised by a motion to vacate, but only on direct review (which, of course, is most unlikely in the consent decree context). *Swift & Company v. United States*, 276 U.S. 311, 313 (1928). For an expression of the view that accords to courts, not on the basis of Article III but rather on the basis of some conception of "the traditions of equity

stand as the guardian of the powers with which he or she is entrusted. The judge acts not just for himself or herself, but as a trustee for the judiciary, and should see the parties' request for what it is—an attempt to appropriate public power for private purposes. The judge should simply decline the parties' request. This might result in a trial, on the assumption that the decretal aspect of the bargain was an indispensable part of the settlement, but if not, the parties can still end the litigation through an agreement. That agreement might on some later occasion, after it is duly examined and tested under the terms of the contract law of the jurisdiction, be enforceable in court; but until that occurs it would not bear the imprimatur of the court. That agreement between the parties might in the meantime be viewed as “a good deal,” but until it is duly tested and examined through a legal proceeding it could not claim to be “the law.” In saying this my intent is not, contrary to what Easterbrook suggests, to deny judges a role in private ordering,²² but only to see to it that their participation in such arrangements scrupulously respects the principles that define and limit their office. The issue is not whether, but how.

III

Skillfully trying to draw the reader in, Judge Easterbrook begins his essay with a claim that “[a]ny legal system that finds compliance with law attractive should find settlement of disputes attractive.”²³ I, of course, find compliance with the law attractive, but remain skeptical of settlement, because, having eschewed the justice as efficiency claim, I do not believe that there is any reason for presuming that a settlement embodies the law. Settlement is not the same as compliance. The parties' predictions about what the court will do and thus what the law requires no doubt enter the bargaining process, but so does a lot more, and that is why it is wrong to equate settlement, understood in a purely contractual sense, and compliance.

Judge Easterbrook's essay is not, however, just a defense of settlement agreements, but also and perhaps more pointedly, a defense of the practice of embodying those agreements in decrees. He therefore moves quickly, in the opening passage of his essay, from the equation of settlement and compliance to an equation of con-

practice,” the power to resist legislative directives, see *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

²² Easterbrook, 1987 U. Chi. Legal F. at 30 (cited in note 6).

²³ *Id.* at 20.

tracts and consent decrees. He notes a few minor differences between contracts and consent decrees, but argues that a consent decree "is a contract all the same," differing from the ordinary contract only in the "speed of enforcement."²⁴ "So," he concludes, in an attempt to establish another irresistible axiom, "any legal system that finds both voluntary compliance and voluntary contracts attractive should find consent decrees attractive."²⁵ I, of course, remain unmoved. I find "voluntary compliance" very attractive. I find "voluntary contracts" less attractive than "voluntary compliance," but still somewhat attractive. But I do not find consent decrees attractive at all. I am able to resist Easterbrook's conclusion because, contrary to what he suggests, a "consent decree" is something more than a "voluntary contract." It represents an exercise of public power that has not been preceded by the processes that serve as the source of the legitimacy and authority of that power. Judge Easterbrook would have us believe that skipping trial and judgment is nothing more than a "speeding up" of the process by which a contract is backed by the contempt power. But surely that is wrong. It is one thing to take a journey quickly and another not to take a journey at all.

²⁴ Id.

²⁵ Id.